Supreme Court of the United States

OCTOBER TERM, 1942

No.

GALBAN LOBO COMPANY, S. A.

Petitioner,

—*vs.*—

LEON HENDERSON, Price Administrator,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR PETITIONER GALBAN LOBO COMPANY, S. A.

Specification of Errors To Be Urged.

It is submitted that the United States Emergency Court of Appeals erred:

1. In holding that the grounds for petitioner's protest arose on March 16th, 1942 when the order of the War Shipping Administration imposing a surcharge on freight became effective.

2. In holding that the action of the Price Administrator in dismissing petitioner's protest on the ground that it had not been filed within the period required by the Statute was correct.

3. In failing to pass upon the constitutional question urged by petitioner.

4. In dismissing the complaint on jurisdictional grounds.

Chronological Statement.

The chronology, which is pertinent in this case, is as follows:

Revised Price Schedule 16 effective February 11, 1942.

Contract made February 28, 1942.

Delivery contracted for March 12th-16th, 1942.

War Shipping Administration Surcharge Order dated March 12th, 1942, effective March 16, 1942.

Vessel loaded March 30th-April 4th, 1942.

Buyer refused to pay contract price April 9, 1942.

Application made to Defense Supplies Corporation to absorb surcharge April 10-20, 1942.

Joint letter of inquiry addressed to OPA by seller and buyer April 22, 1942.

Reply by OPA advising that reduction in contract price would be necessary, May 4, 1942.

Protest filed with OPA June 1, 1942.

Protest dismissed by OPA July 1, 1942.

Complaint filed with Emergency Court of Appeals July 25, 1942.

AUTHORITIES AND ARGUMENT

I.

Petitioner's protest was filed within sixty days of the date when grounds therefor arose.

The Price Administrator and the Court below have taken the position that the grounds for protest arose on March 16, 1942, when the order of the War Shipping Administration imposing a surcharge on freight became effective.

The Court below said that Revised Price Schedule No. 16 plainly prohibits a purchaser of raw cane sugars from paying for "cost, freight and duty combined" more than the maximum price, and that it was obvious when the order of the War Shipping Administration became effective that the FAS contract price would have to be reduced by an equivalent amount. The Court reached this conclusion because of the declaration of the Price Schedule that its mandate was to be observed "regardless of the terms of any contract of sale or purchase." The Court said that petitioner "was bound to take notice" of this declaration of the Price Schedule.

On March 16, 1942, petitioner did not know whether the surcharge order would affect its contract with American or not. If the vessel had not arrived at Puerta Tarafa until after May 15th, there could have been no basis for protest within the 60 day period fixed by the Court below.

Until American refused to pay the contract price, petitioner could not tell that the 22% surcharge would bring the total landed cost of the sugar above the ceiling price. The vessel was chartered to American, and even with the 22% surcharge the landed cost might not have exceeded 3.74¢ per pound.

Even if the added cost had been known and the vessel's

arrival had been certain on March 16th, petitioner did not know that its contract would be affected. The Defense Supplies Corporation had undertaken to absorb the added cost on 1942 crop sugars. Until the request for similar treatment of these sugars was denied it was not known that Defense Supplies Corporation would not do the same for 1941 sugars. If it had granted such application there would have been no basis for protest by petitioner.

When the proper point was reached petitioner and American faced the issue; and not until then could it be said that grounds for protest existed or that a statute of limitations had commenced to run.

Then the parties to the contract were of the opinion that the appropriate course was to present the issue to OPA. From a practical point of view, this seemed to be the sensible and natural action to be taken. It was not regarded as necessary to file a protest before obtaining a ruling from OPA.

Prompt action was taken by both parties to the contract to procure OPA's views. When OPA ruled on the question, petitioner then took timely action to file its protest.

That protest was filed within sixty days of the refusal of the buyer to pay the contract price as well as within sixty days of the date of OPA's ruling. Thus, whichever date might be taken as beginning the running of the statute of limitations, petitioner's protest was timely.

The Court below conceded that "an interpretation resolving an ambiguous provision of a price schedule or regulation might constitute a new ground for protest". It held, however, that the provisions of Revised Price Schedule No. 16 "unambiguously required the application of the War Shipping Administration's freight rate increase to the complainant's sale of sugar to the extent of reducing by the amount of that increase the F. A. S. price which it was entitled to receive for the sugar sold."

To say that the effect of the Price Schedule was unambiguous as of March 16th, 1942 is to impute to the parties affected an understanding of the Statute and Price Schedule and a prevision of the reasoning of the Court that could not possibly be expected either of lawyer or business man. The Court's reasoning begs the question. The issue is not whether the effect of the Price Schedule is unambiguous in the light of the Court's decision; it is whether it was unambiguous as of March 16th, 1942. At that time without the guidance of decision or administrative ruling, both business man and lawyer could be excused for entertaining doubts on the subject.

Petitioner has been refused a hearing on the merits. The Price Administrator has given no consideration to its plea that upon the facts of this case, an exception should be granted permitting the contract to be performed. No question of principle is involved; no conflict with the purposes of price control is presented. The only question is whether the additional expense of the 22% surcharge shall be borne by the buyer (to whom it was billed) or shall be thrown back upon the seller in violation of the terms of the contract itself.

The Price Administrator has recognized the merit of the position taken in this brief in a ruling made in a similar situation relating to wool top futures contracts. Amendment No. 11 to Price Schedule No. 58 effective December 12, 1942 provides that all contracts made after December 10, 1941 may be carried out at the original price so long as that price was not higher than the maximum permitted by Price Schedule No. 58 on the contract date. This amendment became necessary because of the provision for upward and downward revision of the price ceiling in the light of changes in War Risk Insurance rates, promulgated by the War Shipping Administration on wool imported from Aus-

tralia to the East Coast. In announcing Amendment No. 11, OPA made the following statement:

> "The necessity for this amendment is apparent. If it were otherwise, a person could not enter into a futures selling contract for wool tops with the assurance that when the settlement date arrived, he would be able to close his contract at a price at which it was entered into.
>
> "Fluctuations in war risk insurance rates should not have the effect of destroying the contractual certainty that is essential in the orderly operations of a futures market."

The certainty which is essential in the orderly operation of a futures market is no less essential in dealings between producers and importers of sugar. The considerations which led to the adoption of Amendment No. 11 to Price Schedule No. 58 should have led with equal force to the granting of petitioner's plea for relief in this case.

In fairness to petitioner, the Statute should not be construed, under such circumstances, so as to cut off its right of protest sixty days after the imposition of the surcharge. As the law reads there was no compelling need so to construe it.

At the outset of the administration of the law, this case arises as a challenge. The Price Administrator and the Emergency Court of Appeals have adopted a legalistic and technical construction of the law. This Court alone may now take the realistic view and in doing so give assurance that the law will be administered practically and reasonably.

II.

Plaintiff has been deprived of its property without due process of law in violation of the Fifth Amendment of the Constitution.

In the Court below, petitioner urged that the action of the Price Administrator in dismissing its protest was a denial of due process under the Fifth Amendment. That argument was not passed upon by the Court in its decision.

Petitioner sought a hearing by the Price Administrator in order to argue, among other things, that neither the law nor the Price Schedule should be so construed as to render a contract, which was lawful under the Price Schedule when made, subject to impairment through the force of such a subsequent extrinsic event as the order of the War Shipping Administration.

This is not to say that Congress might not constitutionally empower the Price Administrator to invalidate existing contracts in the establishment of price schedules. The Emergency Price Control Act in Section 4 (a) specifically provides that:

> "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, * * * in violation of any regulation or order under Section 2 * * * ."

For the purpose of this case, it may be accepted that Congress has remained within constitutional limits in thus impairing existing contracts.

It does not follow, however, that Congress has authorized or may authorize the Price Administrator to formulate price schedules or regulations in such fashion as to subject con-

tracts made in reliance thereon to the hazards of subsequent events.

The Price Administrator is enjoined in Section 2 (h) of the Act to exercise his powers in such manner as not "to operate to compel changes in the business practices, * * * established in any industry * * * *".

In Price Schedule 16, the Administrator has established maximum prices for raw sugar on a "duty paid, cost and freight basis". The trade has customarily purchased raw sugar on that basis; but it has likewise customarily purchased raw sugar on an F. A. S. or F. O. B. shipping point basis. It has been tacitly assumed by the Court below (and conceded by the Price Administrator in his brief below) that F. A. S. and F. O. B. contracts are permissible and valid under the Price Schedule. Nevertheless, the Court has held that F. A. S. or F. O. B. contracts, valid when made, may be invalidated by a subsequent change in the cost of transportation.

The Statute does not give the Price Administrator the authority so to construe the Price Schedule. Furthermore, such construction of the Price Schedule deprives petitioner of the benefits of a contract which was valid under the Price Schedule when made and, therefore, deprives petitioner of its property without due process of law.

The Court below reasoned that petitioner made its contract with knowledge of the declaration of the Price Schedule that its mandate was to be observed "regardless of the terms of any contract of sale or purchase" and that, therefore, it was obvious on March 16th that its F. A. S. contract price would have to be reduced. In the first place, the quoted portion of the Price Schedule may quite properly be limited in its application to those contracts which were in existence at the date of adoption of the Price Schedule, In the second place, if the F. A. S. contract was a binding

and valid commitment under the terms of the Price Schedule, it was not obvious that its terms were changed by the surcharge order of the War Shipping Administration.

Upon such reasoning, petitioner's contract was no contract at all. It was subject to impairment by any incident which might increase the buyer's cost of transportation. If the crew of the "S. S. YILDUM" had refused to proceed from Puerta Tarafa to New York because of the submarine menace unless the charterer of the vessel should pay them a bonus, such increase in the cost of transportation, according to the Court's reasoning, would impair petitioner's contract by requiring the reduction of the F. A. S. price.

The Court below said: "it is the total cost to the purchaser rather than the portion of that cost which is attributable to the seller which is of crucial importance." The Court erred in this assumption. The Price Schedule does not undertake to fix a ceiling on the cost of raw sugar to the refiner. It fixes a ceiling on the selling price. Any number of additional elements of cost to the refiner may enter into the picture. It is wholly improper to subject the seller of the sugar to the risk of increases in any of such costs.

If sellers are subject to such risks, it would follow that the lowering of freight rates after the making of an F. A. S. contract would be grounds for an increase of the F. A. S. price. Certainly the rights of the seller against the buyer should be no less than those of the buyer against the seller under the provisions of the Price Schedule. Yet such a construction would be obviously improper, as it would destroy the basic terms of F. A. S. and F. O. B. contracts.

Unless the Constitution carries a guarantee against such impairment of contract the business community must face the reality that its contracts are not binding commitments under present price control measures. No one can know whether the contract price will be affected by some extrinsic event before delivery of the merchandise. No man may estimate the risks which his apparent contracts entail.

Such a revolutionary effect upon the business community is not essential to the price control program and was not intended by Congress. Yet that is the effect of the decision below. The premise upon which that decision rests should not be permitted to stand.

CONCLUSION.

Petitioner should be granted a hearing before the Administrator on the merits of its claim that its F. A. S. contract was not invalidated by the order of the War Shipping Administration and that it should be in any case permitted to collect the contract price from the buyer. On the facts of this case, the determination that petitioner's time for filing its protest commenced to run on March 16, 1942 involves an untenable construction of the Statute and an erroneous application of the Statute to the facts of this case. The result is to deprive petitioner of its property without due process of law. On these considerations, it is respectfully submitted that the judgment of the Court below was erroneous and it is, therefore, respectfully submitted that a writ of certiorari to said Court should be granted herein.

Respectfully submitted,

BAER & MARKS
Attorneys for Petitioner.

By DONALD MARKS

Dated: New York, N. Y., December 14th, 1942.

Of Counsel:

DONALD MARKS,
JULIUS B. BAER.